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December 23, 2013

TO: Legislative Council Members

FR: Todd M. Everts, Chief Legal Counsel

RE: Legislator Electronic Communications and Public Record/Right-to-Know Requirements

During the Legislative Council's October 23, 2013, meeting, the Council requested a legal analysis regarding legislator electronic communications and Montana's public record and right-to-know constitutional and statutory requirements. This legal memorandum is my response to that request and does not represent any opinion or action on the part of the Legislative Council.

QUESTION PRESENTED

What are the legal requirements with respect to legislator electronic mail and other digital communications and the public's right to inspect public electronic mail and the retention of electronic mail?

SHORT ANSWER

Legislator electronic mail creates a written record of communication that involves public business, whether generated or received on a public or private e-mail system or device, constitutes a public document that is a public record, and is subject to public examination and public record retention requirements, unless constitutionally protected by individual privacy interests.

Montana law is silent regarding whether other digital communications, such as text messages, instant messaging, or social media postings, potentially constitute a "public record" subject to public examination.

LEGAL ANALYSIS[1]

1. A Legislator's Modern Day Digital Reality

Montana legislator electronic mail and other digital communications -- is it public, private, or both?

[1] In addition to the original legal analysis contained in this memorandum, I have liberally incorporated material verbatim from past legislative attorney opinions (including my own past opinions) related to the issues raised in this memorandum.

Consider this scenario provided by the National Conference of State Legislatures in an article on the private life of legislator e-mail:

> *You're at your desk on the House floor, thumbing through e-mail messages on your personal BlackBerry. One message is from your wife, asking if you will be at parent teacher conferences. Another message is a BlackBerry "PIN" message from a lobbyist, explaining her position on a bill coming up for a vote. On the desk in front of you is your state-owned laptop, which displays messages from constituents in your state e-mail account. Another window on the laptop is opened to your private Yahoo e-mail account. In yet another browser window, your Facebook page is open, showing the messages you've sent to your friends, constituents and legislative colleagues. Which of these communications is a public record? Which messages will you save, and which will you delete?*[2]

In Montana, the answer is that legislator electronic mail can be either public or private depending on the content and whether the electronic mail was generated or received solely on government electronic mail and hardware or on the legislator's private account or device. Montana statutory and case law is silent with respect to other digital communications (text messaging, instant messaging, Facebook pages and postings, tweets, etc.).

The confluence of several provisions of the Montana Constitution, the Montana public record and open meeting statutes, and Montana court decisions dictate whether the content of a legislator's electronic mail is considered to be a matter of public business and therefore open to public inspection and subject to public record retention laws or whether the legislator's electronic mail is constitutionally protected as being private.

2. Constitutional Balancing Act

a. Fundamental Rights

Whether a legislator's electronic mail is a public or private document is a constitutional question in which fundamental constitutional rights are balanced against each other on a case-by-case basis. Additional constitutional provisions also impose specific public participation requirements on legislative bodies and activities.

Article II, sections 8, 9, and 10, of the Montana Constitution provide:

> **Section 8. Right of participation.** The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be

[2] *The Private Life of E-Mail*, Bourquard, Jo Anne, National Conference of State Legislatures, January 2010.

provided by law.

Section 9. Right to know. No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

Section 10. Right of privacy. The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

Because the enumerated rights cited above are included within Article II of the Montana Constitution, the Declaration of Rights, those rights are "fundamental rights". Butte Community Union v. Lewis, 219 Mont. 426, 712 P.2d 1309 (1986). Any infringement of a "fundamental right" will trigger the highest level of scrutiny, strict scrutiny, by the courts. See Wadsworth v. State, 275 Mont. 287, 911 P.2d 1165 (1996), and Gulbrandson v. Carey, 272 Mont. 494, 901 P.2d 573 (1995).

The Montana Supreme Court has held that Article II, sections 8 and 9, are linked in that if an individual is not provided with opportunity to observe public deliberations or examine public documents under Article II, section 9, then that individual cannot exercise his or her right to participate in the operations of agencies under Article II, section 8. Bryan v. Yellowstone County Elemetary School District No. 2, 312 Mont. 257, 60 P.3d 381 (2002). The provisions of Article II, sections 8 and 9, and the implementing statutes are to be liberally construed. See also Assoc. Press v. Crofts, 321 Mont. 193, 89 P.3d 971 (2004); Bryan v. Yellowstone County Elemetary School District No. 2, 312 Mont. 257, 60 P.3d 381 (2002); Common Cause of Montana v. Statutory Committee to Nominate Candidates for Commissioner of Political Practices, 263 Mont. 324, 868 P.2d 604 (1994).

The rights granted in Article II, section 9, of the Montana Constitution to examine documents and to observe the deliberations of all public bodies apply to all persons and public bodies of the state and its subdivisions without exception, including the courts. Great Falls Tribune v. District Court, 186 Mont. 433, 608 P.2d 116 (1980). The right to know is not absolute. Missoulian v. Board of Regents, 207 Mont. 513, 675 P.2d 962 (1984). The Constitution specifically provides that the right is subject to the right of individual privacy. The right of privacy is not absolute. Montana Human Rights Division v. City of Billings, 199 Mont. 434, 649 P.2d 1283 (1982).

In order to determine whether legislator electronic mail is considered a public or private document, the Montana Supreme Court has held that it is necessary to balance the competing constitutional interests in the context of the facts of each case in order to determine whether the demands of individual privacy clearly exceed the merits of public disclosure. Under this test, either right may outweigh the other based on the facts of the case. Flesh v. Board of Trustees, 241 Mont. 158, 786 P.2d 4 (1990); Missoulian v. Board of Regents, 207 Mont. 513, 675 P.2d 962

(1984). The Court has adopted a two-part test to determine whether a privacy interest is constitutionally protected: (1) whether the person involved has a subjective or actual expectation of privacy, and (2) whether society is willing to recognize that expectation as reasonable. Flesh v. Board of Trustees, 241 Mont. 158, 786 P.2d 4 (1990); Missoulian v. Board of Regents, 207 Mont. 513, 675 P.2d 962 (1984); Montana Human Rights Division v. City of Billings, 199 Mont. 434, 649 P.2d 1283 (1982).

In Missoulian v. Board of Regents, the Missoulian challenged the closure by the Board of Regents of a job performance evaluation of the University System's presidents. The challenge was based on the constitutional right to know. The Court determined that the first part of the test was satisfied because the presidents were assured that the evaluation would be confidential, as were others providing input to the Regents. The second part of the test was also satisfied by the need to ensure an unabashed and candid evaluation of presidents. University presidents' job performance evaluations were matters of individual privacy protected by Article II, section 10, of the Montana Constitution. In this case, the demands of individual privacy of the university presidents and other university personnel in confidential job performance evaluation sessions by the Board of Regents clearly exceed the merits of public disclosure.

Sections 2-3-203, 2-6-101, 2-6-102, 2-6-104, and 2-6-110, MCA, codify this constitutional balancing test within the statutes regarding public records and the public right-to-know and participate. Public records do not include records that are constitutionally protected from disclosure. Records and materials that are constitutionally protected from disclosure are not subject to the provisions of section 2-6-102, MCA, regarding a citizen's right to inspect and copy public writings. Information that is constitutionally protected from disclosure is information in which there is an individual privacy interest that clearly exceeds the merits of public disclosure, including legitimate trade secrets, as defined in section 30-14-402, MCA, and matters related to individual or public safety. A public officer may not withhold from public scrutiny any more information than is required to protect an individual privacy interest or safety or security interest.

The constitutional right to examine public documents is codified in section 2-6-102, MCA, which provides that every citizen has a right to inspect and take a copy of any public writings of this state, except as provided in sections 22-1-1103 and 22-3-807, MCA, [library records and human skeletal remains records] or in section 2-6-102(3), MCA, [constitutionally protected records] and as otherwise expressly provided by statute. Every public officer having the custody of a public writing that a citizen has a right to inspect is bound to give the citizen on demand a certified copy of it, on payment of the legal fees for the copy, and the copy is admissible as evidence in like cases and with like effect as the original writing. However, the certified copy provision does not apply to the public record of electronic mail provided in an electronic format.

Pursuant to section 2-6-110, MCA, a person is also entitled to a copy of public information compiled, created, or otherwise in the custody of a public agency that is in electronic format or other nonprint information. Section 2-6-110, MCA, also provides that all the restrictions relating to confidentiality, privacy, business secrets, and copyright are applicable to electronic or

nonprint information.

If the constitutional right to know is denied, a person can go to the courts for injunctive or prospective relief. A decision made in a meeting that was unconstitutionally closed to the public or that included an unconstitutional denial to examine public documents used in the public body's decision renders the decision void. Bryan v. Yellowstone County Elementary School District No. 2, 312 Mont. 257, 60 P.3d 381 (2002). Section 2-3-221, MCA, provides that a person who successfully sues to assert the constitutional right to know can be awarded costs and reasonable attorney fees.

b. Additional constitutional requirements imposed on the Legislature and legislators.

In addition to the fundamental rights in Article II, Article V, section 10(3), of the Montana Constitution requires "[t]he sessions of the legislature and of the committee of the whole, all committee meetings, and all hearings shall be open to the public." This separate constitutional requirement imposed on the Legislature (and indirectly legislators) in addition to the right to know and participate arguably places a heightened emphasis of "openness" upon the Legislature as an institution.

In the only legal proceeding to date against the Legislature regarding the public's right to know, specifically regarding public documents, Judge Honzel of the 1st Judicial District, ruled that by denying the Montana Environmental Information Center (MEIC) access to bill drafts and other documents until the completion of the bill drafting process, the Montana Legislative Environmental Quality Council and the Legislative Council violated MEIC's right to examine public documents under Article II, section 9, of the Montana Constitution. Montana Environmental Information Center v. Montana Environmental Quality Council, 1995 Mont. Dist. LEXIS 898 (MT 1st Judicial District 1995), Cause No. CDV-95-207. Judge Honzel ruled that legislative bill draft requests are open to the public and that the right to know does not contain an exemption for bill drafts or bill draft requests and that the court cannot find such an exception where one does not exist. Counsel of record for the Legislature in this legal proceeding (Mr. Petesch and Mr. Everts) conscientiously raised, among many other defenses, the defense that under the Speech or Debate Clause (Article V, section 8, of the Montana Constitution) members of the Legislature and legislative employees are immune from a suit on the basis of the constitutional right to know. Judge Honzel disagreed and concluded that there was no immunity from suit for legislative employees. This is important because other state Legislatures have successfully used their constitutional speech and debate immunity provisions to limit access to certain information in public records.

3. Public Record Statutory Framework Regarding Electronic Mail and Other Digital Communications

a. Is electronic mail considered a part of the "public record"? Yes.

The public record statutes clarify what constitutes a public document by classifying "writings" as public and private. Section 2-6-101(2), MCA, provides that public writings include electronic mail:

> (2) Public writings are:
> (a) the written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, *legislative*, judicial, and executive, whether of this state, of the United States, of a sister state, or of a foreign country, except records that are constitutionally protected from disclosure;
> (b) public records, kept in this state, of private writings, *including electronic mail*, except as provided in 22-1-1103 and 22-3-807 and except for records that are constitutionally protected from disclosure. (*emphasis added*)

Section 2-6-101(3), MCA, further provides that public record electronic mail constitutes one of the four classes of public writings:

> (3) public writings are divided into four classes:
> (a) laws;
> (b) judicial records;
> (c) other official documents;
> (d) public records, kept in this state, of private writings, *including electronic mail*. (*emphasis added*)

Outside of those four denoted classes of public writings, all other writings are considered private (section 2-6-101(4), MCA).

The definition of "public records" in section 2-6-202, MCA, provides:

> (1) (a) "Public records" includes:
> (i) any paper, correspondence, form, book, photograph, microfilm, magnetic tape, computer storage media, map, drawing, or other document, including copies of the record required by law to be kept as part of the official record, regardless of physical form or characteristics, that:
> (A) has been made or received by a state agency to document the transaction of official business;
> (B) is a public writing of a state agency pursuant to 2-6-101(2)(a); and
> (C) is designated by the state records committee for retention pursuant to this part; and

(ii) all other records or documents required by law to be filed with or kept by any agency of the state of Montana.
(b) *The term includes electronic mail sent or received in connection with the transaction of official business.*
(c) The term does not include any paper, correspondence, form, book, photograph, microfilm, magnetic tape, computer storage media, map, drawing, or other type of document that is for reference purposes only, a preliminary draft, a telephone messaging slip, a routing slip, part of a stock of publications or of preprinted forms, or a superseded publication. (*emphasis added*)

Electronic mail creates a written record of communication that is included within the definition of "public record". Under the constitutional provisions and sections 2-6-101, 2-6-102, and 2-6-202, MCA, electronic mail may be a public document depending upon the content or subject matter of the electronic mail. It is crystal clear under Montana law that legislative public writings that are public records specifically include electronic mail.

b. Is legislator electronic mail that involves public business on government e-mail systems or hardware considered a public record? Yes.

As noted above, pursuant to sections 2-6-101, 2-6-102, and 2-6-202, MCA, electronic mail that has been made or received by a public body or public official (legislator) in connection with public business on government e-mail systems and hardware is a public record subject to examination. The content of legislator electronic mail that constitutes public business is the lynchpin in a court's determination as to whether that electronic mail is open to public examination.

In Bryan v. Yellowstone County Elementary School District No. 2, 312 Mont. 257, 60 P.3d 381 (2002), a school district assembled a group of people to research and advise the district on the closure of schools, and a member of the group summarized the closure research information on a computer-generated spreadsheet and delivered various versions of the spreadsheet to various people and groups. The version given to the school district contained a system rating the schools and explaining the rating system, but the group of parents that the plaintiff belonged to was given a version not containing the rating system when a member of the group requested a copy. The school district told the group that a spreadsheet comparing the schools did not exist. The spreadsheet was a document of a public body subject to public inspection prior to the time that the school district's board met and used the spreadsheet to help determine which schools to close. The school district violated the plaintiff's right to examine public documents. At a minimum, the "reasonable opportunity" standard articulated in Article II, section 8, of the Montana Constitution and section 2-3-111, MCA, for the right to participate demands compliance with the right to know contained in Article II, section 9, of the Montana Constitution. When the school district violated the plaintiff's right to know, it reduced what should have been a genuine interchange into a mere formality. Bryan could and did voice her opinion to the school district, but did so without the ratings information contained on the version of the spreadsheet used by the school district.

Therefore, the school district also violated her right of participation under Article II, section 8, of the Montana Constitution. The Supreme Court stated that this violation tainted the entire process from start to finish and ruled that the school district's closure decision was void. On remand, the court stated that the school district should allow the plaintiff an opportunity to rebut the closure decision and should then reexamine the decision and affirm or modify it.

Bryan v. Yellowstone County Elementary School District No. 2 is informative because it shows that the nature of the document itself is the important matter, not whether the document was produced or stored on private or public equipment.

c. Is legislator electronic mail that involves private business on government e-mail systems or hardware considered a public record? Probably not.

Section 2-2-121(2)(a), MCA, provides that a public officer or public employee may not use public time, facilities, equipment, supplies, personnel, or funds for the officer's or employee's private business purposes. There is no similar prohibition for legislators. Therefore, a legislator likely may use publicly provided computers and e-mail systems for private business purposes. The e-mails on the public system relating to private business purposes should be protected from disclosure because the legislator would have an actual expectation of privacy and society should recognize the reasonableness of this expectation for part-time citizen legislators who are required to maintain businesses while serving in the Legislature.

Conversely, an argument could be made that public records of private writings of legislators on a government e-mail system or government hardware, including legislator electronic mail, are considered public writings under section 2-6-101(3)(d), MCA, and are therefore potentially open to public examination.

d. Is legislator electronic mail that involves public business on the legislator's private e-mail system or hardware considered a public record? Probably yes.

As noted previously, e-mail content that involves public business will likely be considered a public record subject to examination regardless of whether the electronic mail was produced on an private e-mail system or private hardware system.

e. Is legislator electronic mail that involves private business on the legislator's private e-mail system or hardware considered a public record? No.

A legislator's electronic mail that involves private business on a legislator's private e-mail system or hardware would not be considered a public writing pursuant to section 2-6-101, MCA, and therefore would not be subject to public examination.

f. Are legislator text messages or instant messaging communications considered

a part of the "public record"?

There is no Montana statutory or case law regarding this issue.

g. Are legislator social media postings (Facebook, tweets, etc.) considered a part of the "public record"?

There is no Montana statutory or case law regarding this issue.

4. Public Record Retention Requirements Regarding Legislator Electronic Mail

As noted previously, electronic mail creates a written record of communication that is included within the definition of "public record". Under Montana law, electronic mail is subject to the same retention requirements as other public records.

Section 2-6-214, MCA, provides that in order to ensure compatibility with the information technology systems of state government, the Department of Administration is required to develop standards for technological compatibility for state agencies for records management equipment or systems used to electronically capture, store, or retrieve public records through computerized, optical, or other electronic methods. The Department of Administration is required to approve all acquisitions of Executive Branch agency records management equipment or systems used to electronically capture, store, or retrieve public records through computerized, optical, or other electronic methods to ensure compatibility with the standards developed under section 2-6-214(1), MCA.

Pursuant to Title 2, chapter 6, MCA, the State Records Committee has developed "guidelines" for the retention of e-mail records. The guidelines specify that e-mail is a public document and may be a public record subject to retention schedules for all public records. The determination of the "record" value of e-mail is based upon its content.

In Billings v. Owen, 331 Mont. 10, 127 P.3d 1044 (2006), following settlement of a human rights charge, Owen asked to examine the records of the Billings Police Department (BPD) that had been furnished to the Human Rights Bureau. The BPD objected to release of the information on grounds that the records contained information from individuals who held an expectation that the information that they had given to the BPD would be kept confidential and that the privacy rights of those individuals outweighed Owen's right to know. A Department of Labor and Industry hearings examiner subsequently denied the BPD's objection and ordered that the records be produced for Owen's inspection. The BPD sought judicial review, and the District Court voided the Department's decision, holding that the Department did not have the authority or jurisdiction to decide the constitutional issues raised by Owen. On appeal, the Supreme Court reversed. Consistent with Great Falls Tribune v. Montana Public Service Commission, 319 Mont. 38, 82 P.3d 876 (2003), and Shoemaker v. Denke, 319 Mont. 238, 84 P.3d 4 (2004), the Department had original jurisdiction to review its own records and determine if any constitutionally protected

privacy rights were implicated by those records and whether those privacy rights clearly outweighed Owen's right to examine the records. The analysis by the Department involved mixed questions of fact and law and thus did not qualify as an exception to the requirement that a person must first exhaust administrative remedies. The Court pointed out that denying administrative agencies the authority or jurisdiction to make the initial decision on whether the agencies' own records may be examined would require a lawsuit every time that a request to inspect records was met with an objection by the producing party and thus would put the right to know out of reach for most citizens.

If a legislator receives a request for copies of e-mails, then pursuant to Billings v. Owen, it would be appropriate to seek the assistance of the Legislative Services Division in determining if the email is "public" in nature and subject to examination. Legislators should comply with retention schedules and records management requirements for e-mails relating to public business that are public records.

CONCLUSION

Legislator electronic mail creates a written record of communication that involves public business, whether generated or received on a public or private e-mail system or device, constitutes a public document that is a public record, and is subject to public examination and public record retention requirements, unless constitutionally protected by individual privacy interests.

Montana law is silent regarding whether other digital communications, such as text messages, instant messaging, or social media postings, potentially constitute a "public record" subject to public examination.

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